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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALFREDO GAMATERO,

Plaintiff and Appellant,

v.

BANC OF AMERICA AUTO FINANCE CORPORATION et al.,

Defendants and Respondents.

G031537

(Super. Ct. No. 01CC00761)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Lakeshore Law Center and Jeffrey Wilens for Plaintiff and Appellant.

Stroock & Stroock & Lavan, Julia B. Strickland and David W. Moon for Defendants and Respondents.

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Alfredo Gamatero contends the trial court erred in denying class certification of his Consumer Legal Remedies Act (Civ. Code, § 1770)[1] claims against Banc of America Auto Finance Corporation and related defendants (BAAFC). For the reasons discussed below, we affirm.

I

FACTS AND PROCEDURAL BACKROUND

Gamatero and his wife leased a truck from National Auto Leasing & Sales, Inc. (the dealer). The lease identified the dealer as "lessor," the Gamateros as "lessees," and mentioned BAAFC as a potential assignee. The lease agreement forms were provided by BAAFC, and the dealer later assigned its interest to BAAFC.

Signed in March 2000, the lease agreement provided for a $595 "Lease Acquisition Fee." According to the declaration of Susan Mickas, a senior vice president and former manager responsible for the company's leasing operations, BAAFC allocated the lease acquisition fee to costs in various areas, including booking and maintenance of lease accounts and periodic review of its lease financing practices and rates. For a few months in 1999, BAAFC's minimum acquisition fee was $495 on used cars and $595 on new cars, but BAAFC settled on a fixed fee of $550 for both new and used cars in July 1999.[2]

Beginning in March 1999, BAAFC allowed dealers to charge an acquisition fee up to $300 higher than BAAFC's base fee of $550. BAAFC implemented this change "to allow dealers to recapture some of their own costs of acquiring lease customers on

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[1] All further statutory references are to this code, unless otherwise specified.

[2] In lieu of an acquisition fee, BAAFC also accepted assignment of leases that included an increased "money factor" used to determine the rent charge during the course of the lease, but this practice is not relevant to Gamatero's appeal.

leases assigned to BAAFC." Gamatero does not dispute that the dealer, not BAAFC, determined how much, if any, to increase the lease acquisition fee. According to Gamatero, BAAFC funded as many as 100,000 leases during the relevant time frame and a random sampling showed eight percent involved lease acquisition fees of more than $550. Gamatero's lease acquisition fee was $595, or $45 higher than the BAAFC's base fee.

According to Mickas's declaration: "BAAFC's practices with respect to 'splitting' lease acquisition fees with dealers was in complete accordance with standard industry practice in California. Specifically, allowing dealers to recoup their acquisition costs by 'marking up' the lease acquisition fees required by the assignees of the leases was, and is, a common business practice in the leasing industry. For example, most major banks in California expressly allow dealers to increase lease acquisition fees published in bank rate sheets and to retain their own portions of the fees charged."

After signing the lease agreement with an "agreed upon value" of $32,899.50 for the Toyota 4-Runner truck, Gamatero saw newspaper advertisements suggesting the manufacturer's suggested retail price for that model was actually $5,000 less. Gamatero felt the deal was not "fair" and stopped making payments. BAAFC repossessed the vehicle.

Gamatero subsequently filed suit against the dealer, the dealer's salesperson, Bank of America, and numerous does, including BAAFC. The first amended complaint alleged the defendants' leasing practices violated: (1) the Vehicle Leasing Act (§ 2985.7); (2) the Consumer Credit Reporting Agencies Act (§ 1785.1); (3) the Unfair Competition Act (Bus. & Prof. Code, § 17200); and (4) the Consumer Legal Remedies Act (CLRA, § 1770). Only the fourth cause of action was asserted on a class-wide basis.

The gravamen of Gamatero's putative class action was that the dealer practice of charging up to $300 over BAAFC's lease acquisition fee, which Gamatero understood to include *only* fees allocable to the financing institution, violated the CLRA's prohibition against unfair or deceptive acts in the sale or lease of consumer goods. After a hearing,[3] the trial court denied class certification, concluding: "1. Plaintiff has failed to show a common understanding of the term 'lease acquisition among putative class members; and [¶] 2. Questions of law or fact common to the class are not substantially similar and do not predominate over the questions affecting the individual members pursuant to California Civil Code Section 1781[, subdivision] (b)(2)." Gamatero now appeals.

II

DISCUSSION

A. Standard of Review

"The decision whether to certify a class rests within the sound discretion of the trial court [citations] and will not be disturbed on appeal if supported by substantial evidence, unless either improper criteria were employed or erroneous legal assumptions were made." (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) "'A class action is maintainable only when there exists a community of interest in common questions of law and fact among the claimants to be represented, and it is likely that the combination of claims in a single action will substantially benefit both the claimants and the courts. [Citations.] . . . [Citations.]'" (*D'Amico v. Sitmar Cruises, Inc.* (1980) 109 Cal.App.3d 323, 326-327; see Civ. Code, § 1781 [authorizing consumer class actions].) "[I]t is the plaintiff's burden to establish that in fact the requisites for

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[3] Gamatero failed to provide on appeal the transcript of this hearing.

continuation of the litigation in [class] format are present. [Citations.]" (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 471 (*Hamwi*).)

On appeal, "[t]o determine if the class has the requisite community of interest, we examine the allegations of the complaint, the declarations of the attorneys [citation], and the evidence introduced at the certification hearing below. [Citation.] We then decide whether the trial court correctly determined the plaintiff satisfied its burden of showing that common issues of law and fact predominate over individual issues among the class members. [Citation.]" (*Norwest Mortgage, Inc. v. Superior Court* (1999) 72 Cal.App.4th 214, 221.) "[S]atisfaction of that burden requires that the plaintiff establish more than a 'reasonable possibility' that class action treatment is appropriate. The 'reasonable possibility' standard applies when the class action complaint is tested on demurrer [citation], but not when the court determines the issue of class propriety at [a] hearing on an appropriate motion at which evidence is presented. [Citations.] Then the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact." (*Hamwi*, *supra*, 72 Cal.App.3d at pp. 471-472.)

B. Plaintiff Failed to Meet His Burden

Gamatero alleged in his complaint that "[t]he term 'lease acquisition fee' has only one commonly understood meaning in the auto leasing industry and to consumer[s]: the fee required by the 'Bank' which is providing the financing for the lease of the vehicle. It is a payment entirely intended for the financing entity and not the selling entity (i.e., the dealership)." The lone evidence supporting Gamatero's interpretation consisted of his own declaration and excerpts from his deposition. His declaration stated: "Prior to signing, I read the Agreement, saw the lease acquisition fee charge, and understood this fee to be a mandatory fee imposed by the financing Bank and which either must be passed on to the consumer or [be] absorbed by the dealership. I did not believe that any portion of the lease acquisition fee would go into the pockets of the dealership." In his deposition, Gamatero claimed a dealer salesperson misrepresented to him the lease acquisition fee was set by "the bank" and that the entire fee would be paid to the bank.

The trial court did not abuse its discretion in determining Gamatero failed to show a misrepresentation common to the putative class members. Gamatero's position depended on a common understanding among putative class members that the term "lease acquisition fee" referred only to amounts set by and due to the financing company, not a dealer. But neither the bare term, "lease acquisition fee," nor the scant evidence introduced by Gamatero support his position. The term by itself is ambiguous. (See *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 (*Winet*) [whether a contract term is ambiguous is a question of law for de novo interpretation].) No modifier declares *whose* "lease acquisition fee" is being collected. The lease agreement did not specify "*financier's* lease acquisition fee." Gamatero does not dispute dealers may incur lease acquisition fees in the form of arranging financing packages with a particular lending institution, acquiring the necessary forms, training its personnel in their use, advertising particular financing terms, time spent with the customer completing the financing agreement, and time spent completing assignment of the agreement.

In any event, close parsing of the term in dispute does not require Gamatero's interpretation. The disputed language is not "lease *financing* fee" but "lease *acquisition* fee." Gamatero acquired the lease from the dealer (the "lessor"), not BAAFC, suggesting the fee might strictly be understood as the former's rather than the latter's. That is not to say Gamatero's interpretation is implausible or wholly idiosyncratic. But given the demonstrable ambiguity of the term, especially without any possessive modifier, Gamatero had to do more than simply rely on the purported plain meaning of "lease acquisition fee." (See *Hamwi*, *supra*, 72 Cal.App.3d at p. 472 ["the plaintiff must establish the community as a matter of fact"].)

This he failed to do. His contention that every putative class member interpreted "lease acquisition fee" as he did lacks evidentiary support. He submitted only his own declaration regarding *his* understanding of the term. No evidence existed regarding any other class member's interpretation. As to Gamatero's contention his lay interpretation of "lease acquisition fee" represented the common understanding of the automobile leasing industry, Mickas, a leasing professional with 29 years' experience, directly contradicted him. The burden of proof rested upon Gamatero, and the trial court could properly conclude he failed to satisfy it. And while Gamatero contends a dealer salesperson orally misrepresented to him the meaning of "lease acquisition fee," no evidence supports his implied contention that similar misstatements were made to others. (See *Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 244 [class certification inappropriate without evidence of standard misrepresentation]; *National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1284 ["'canned sales pitch,'" required].)

The "'ultimate decision as to the showing required at the pretrial level in order to maintain the class action should be within the discretion of the trial court, providing it applies the correct criteria in making its determination. [Citations.]'" (*Caro v. Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644, 655 (*Caro*).) By inquiring into the supposed common misrepresentations, the trial court applied the correct criteria. In the absence of the necessary community of interest, the court did not abuse its discretion by denying class certification. Resisting this conclusion, Gamatero correctly contends the court could infer *reliance* on any common misrepresentations (see *Occidental Land, Inc.*

v. Superior Court (1976) 18 Cal.3d 355, 363), but this legal truth does nothing to establish the factual predicate of a common misrepresentation. Gamatero's argument has no merit.

C. Unconscionability, Ambiguity, and Extrinsic Evidence

Finally, Gamatero argues the "lease acquisition fee" term was unconscionable and that, because unconscionability is generally a question of law, a community of interest in a common question of law existed as to whether the term was unconscionable. Gamatero preserved this argument below, but it does not help him on appeal. Here, the record does not support a common understanding of the terms alleged to be unconscionable. As discussed above, the relevant term was ambiguous and extrinsic evidence may be admitted to explain ambiguities in a contract. (See *Winet*, *supra*, 4 Cal.App.4th at p. 1165.) The extrinsic evidence in this case would necessarily consist of declarations or testimony regarding how individual class members understood the "lease acquisition fee" term. The class form cannot be maintained in such circumstances. "[I]f a class action 'will splinter into individual trials,' common questions do not predominate and litigation of the action in the class format is not appropriate. [Citation.]" (*Hamwi*, *supra*, 72 Cal.App.3d at p. 471.) "Thus, a class action cannot be maintained if each individual's right to recovery depends on facts peculiar to that individual." (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 809.) Where "class members would have to prove individually the existence of liability and damages, the community of interest requirement [is] not satisfied . . . ." (*Caro*, *supra*, 18 Cal.App.4th at p. 669.) The trial court did not abuse its discretion.

III

DISPOSITION

The order denying class certification is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.